

OFFICE OF TAX APPEALS
STATE OF CALIFORNIA

In the Matter of the Appeal of:

J. SWOBEN

) OTA Case No. 19085160

)
)
)
)
)

OPINION

Representing the Parties:

For Appellant:

J. Swoben

For Respondent:

Jean M. Cramer, Tax Counsel IV

N. DANG, Administrative Law Judge: Pursuant to Revenue and Taxation Code (R&TC) section 19324, J. Swoben (appellant) appeals an action by respondent Franchise Tax Board (FTB) denying his claim for refund for the 2018 tax year.

Appellant waived his right to an oral hearing, and therefore, we decide the matter based on the written record.

ISSUE¹

Whether there is reasonable cause warranting waiver of the underpayment of estimated tax penalty.

FACTUAL FINDINGS

1. In 2018, the federal government paid appellant a whistleblower award of \$10,199,100. After attorney's fees, appellant received \$6,115,315.
2. Thereafter, appellant made two estimated tax payments of \$8,952 and \$800,000. The latter payment was untimely.

¹ Appellant argues that FTB violated his right to due process and that the penalty is prohibited by the Excessive Fines Clause of the Eighth Amendment to the United States Constitution. We lack jurisdiction to consider these arguments. (Cal. Code Regs., tit. 18, § 30104(d); Cal. Const., art. III, § 3.5.)

3. Appellant filed a 2018 California Resident Income Tax Return, reporting (among other things) the \$6,115,315 portion of the whistleblower award he received after attorney's fees and claiming a \$12,846 overpayment.
4. FTB processed appellant's return and issued a Notice of Tax Return Change – Revised Balance, which imposed a \$16,257 underpayment of estimated tax penalty. The underpayment amount was initially computed using the regular installment method (i.e., based on required quarterly estimated tax payments of 30, 40, 0, and 30 percent).
5. During briefing in this matter, appellant asserted, and FTB concedes, that appellant received the whistleblower award in October 2018. To account for appellant's receipt of this income late in the year, FTB used the annualized income installment method to compute a revised penalty amount of \$2,941.

DISCUSSION

There are only two conditions under which waiver of the underpayment of estimated tax penalty is warranted. Those conditions are where such underpayment was due to: (1) casualty, disaster, or other unusual circumstances such that imposition of the penalty would be against equity and good conscience; or (2) reasonable cause and not willful neglect, and either the taxpayer retired after having attained age 62 or became disabled, in the taxable year for which the estimated tax installments were required to be made or in the previous taxable year. (IRC, § 6654(e)(3)(A)-(B).)² When FTB imposes a penalty, the law presumes that the penalty was imposed correctly. (*Appeal of Myers* (2001-SBE-001) 2001 WL 37126924.) To overcome this presumption, a taxpayer must provide credible and competent evidence that waiver of the penalty is warranted. (*Ibid.*)

Appellant asserts that he was unable to timely make the required estimated tax payment because he needed the assistance of the federal government to properly ascertain the taxable portion of his whistleblower award, and that he was unable to obtain that assistance as a result of a federal government shutdown, which lasted from December 22, 2018, through January 25, 2019 (after the time period for which his final estimated tax payment was due).

Appellant's argument squarely implicates reasonable cause as the sole basis for waiver of the penalty. To establish reasonable cause, a taxpayer must demonstrate that the failure to pay

² California conforms (with some modifications) to Internal Revenue Code (IRC) section 6654 at R&TC section 19136.

occurred despite the exercise of ordinary business care and prudence. (Cf. *Appeal of Scott* (82-SBE-249) 1982 WL 11906.)


In deciding this issue, we need not consider whether appellant had, in 2019 or 2018, retired upon reaching the age of 62 or became disabled because we find that regardless, appellant has not established reasonable cause for failing to make a timely estimated tax payment. The standard of ordinary business care and prudence required that appellant make a timely payment based upon a reasonable estimate of his tax liability. (Cf. *Appeal of Scott, supra.*) Appellant has not shown that he made any such attempt or that he was prevented from doing so. Despite appellant's assertion to the contrary, the federal government closure did not preclude him from making the required estimated tax payment. To the extent appellant was attempting to determine the deductibility of the attorney's fees he incurred, California does not conform to federal law in this regard. (R&TC, § 17072(c).) Moreover, appellant could have readily obtained professional tax advice elsewhere during this time (such as from the private sector), contacted FTB for assistance, or at the least made an estimated tax payment based on the \$10,199,100 that he received. Accordingly, appellant has not shown reasonable cause for his failure to make the required estimated tax payment.

HOLDING


There is no reasonable cause warranting waiver of the underpayment of estimated tax penalty.


DISPOSITION

Consistent with its concession in this matter, FTB's action is modified to reduce the penalty amount to \$2,941. Otherwise, FTB's action is sustained.

DocuSigned by:

4D465973FB44469...
Nguyen Dang
Administrative Law Judge

We concur:

DocuSigned by:

UC90542BEF88D4E7...
Tommy Leung
Administrative Law Judge

DocuSigned by:

1A8C8E38740B4D5...
Cheryl L. Akin
Administrative Law Judge

Date Issued: 4/14/2020